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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GLEN LERNER INJURY ATTORNEYS, a
Nevada Corporation,

Plaintiff,

v.

LAKE MEAD EMERGENCY PHYSICIANS,
LLC, a Nevada Limited Liability Company;
CMRE FINANCIAL SERVICES, INC., a
California Corporation; NORTH VISTA
HOSPITAL, INC., a Delaware Corporation;
ORSOSITO, LIMITED LIABILITY COMPANY,
a Nevada Limited Liability Company d/b/a
COMPLETE CARE MEDICAL CENTER;
JAGET, LTD., a Nevada Corporation d/b/a
SPINAL REHABILITATION CENTERS; CHW
NEVADA IMAGING COMPANY, LLC, a
Nevada Limited Liability Company d/b/a
NEVADA IMAGING CENTERS;
HEALTHCARE SYSTEMS, INC., a Washington
Corporation d/b/a HSI; AGATA-VENGER
PARTNERSHIP, LLP, a Nevada Limited
Liability Partnership d/b/a WESTERN
REGIONAL CENTER FOR BRAIN AND SPINE
SURGERY; CLARK COUNTY COLLECTION
SERVICE, LLC, a Nevada Limited Liability
Company; SUNRISE MOUNTAINVIEW

CASE NO. 2:13-cv-00896-APG-GWF

**WILSON-MCSHANE
CORPORATION'S ANSWER AND
COUNTERCLAIM TO PLAINTIFF'S
COMPLAINT IN INTERPLEADER**

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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1 HOSPITAL, INC., a Nevada Corporation; WEST
2 VALLEY IMAGING LIMITED PARTNERSHIP,
3 a Nevada Limited Partnership; NEVADA
4 CREDICO, INC., a Nevada Corporation d/b/a
5 QUANTUM COLLECTIONS; CENTENNIAL
6 PAIN RELIEF NETWORK, INC., a Nevada
7 Corporation d/b/a CENTENNIAL SPINE &
8 PAIN; MOUNTAIN REHABILITATION
9 SERVICES; MOIHARWIN DIVERSIFIED
10 CORPORATION, a Nevada Corporation d/b/a
11 VEGAS VALLEY COLLECTION SERVICE;
12 LAS VEGAS NEUROSURGERY
13 ORTHOPAEDICS AND REHABILITATION,
14 LLP, a Nevada Limited Liability Partnership;
15 DESERT ORTHOPAEDIC CENTER, LTD., a
16 Nevada Corporation; ORTHOPAEDIC MOTION,
17 INC., a Nevada Corporation; CANYON
18 MEDICAL BILLING, LLC, a Nevada Limited
19 Liability Company; MED-CARE SOLUTIONS,
20 LLC, a Nevada Limited Liability Company; NEW
21 CENTURY REHABILITATION, LLC, Nevada
22 Limited Liability Company d/b/a MATT SMITH
23 PHYSICAL THERAPY; SDMI LIMITED
24 PARTNERSHIP, a Nevada Limited Partnership
25 d/b/a STEINBERG DIAGNOSTICS; KEY
26 HEALTH MEDICAL SOLUTIONS, INC., a
27 California Corporation; RED ROCK
28 DIAGNOSTICS, a Nevada Limited Liability
Company; BRIAN A. LEMPER, D.O., a Nevada
Corporation; CARE REHAB AND
ORTHOPAEDIC PRODUCTS, INC., a Virginia
Corporation d/ba/ PROGENIX; JOSEPH J.
SCHIFINI, M.D., LTD., a Nevada Corporation;
RADAR MEDICAL GROUP, LLP, a Nevada
Limited Liability Partnership; DIAGNOSTIC
IMAGING OF SOUTHERN NEVADA LIMITED
PARTNERSHIP, a Nevada Limited Partnership;
INSTITUTE OF ORTHOPAEDIC SURGERY,
LLC, a Nevada Limited Liability Company;
NEVADA ORTHOPAEDIC & SPINE CENTER,
LLP, a Nevada Limited Liability Partnership;
JEFFREY D. GROSS, M.D., INC., a California
Corporation d/b/a COMPREHENSIVE INJURY
INSTITUTE; OASIS WELLNESS CENTER,
LLC, a California Limited Liability Corporation;
PAIN INSTITUTE OF NEVADA, INC., Nevada
Corporation; JORGENSEN & KOKA, LLP, a
Nevada Limited Liability Partnership d/b/a

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1 PRIMARY CARE CONSULTANTS; CARDIO
 2 VASCULAR PLUS, INC., a California
 3 Corporation; NATIONWIDE CREDIT
 4 RECOVERY, a California corporation; TOM
 5 BROOKS LLC, a Nevada Limited Liability
 6 Company d/b/a TOM BROOKS PHYSICAL
 7 THERAPY & SPORTS MEDICINE; PRACTICE
 8 ADMINISTRATIVE CONSULTANTS, a
 9 California Corporation d/b/a COAST
 10 RADIOLOGY AND IMAGING; DIOGENES
 11 ANESTHESIA MEDICAL GROUP, INC., a
 12 California Corporation; NATIONAL INTRA-
 13 OPERATIVE MONITORING; PACIFIC
 14 HOSPITAL OF LONG BEACH; JOJASO
 15 MANAGEMENT, INC., a Nevada Corporation;
 16 PROGRESSIVE MOTION, INC., a Nevada
 17 Corporation; MEDICAL INVESTMENT, INC., a
 18 Nevada Corporation d/b/a PURE MEDICAL
 19 EQUIPMENT; VALLEY VIEW SURGERY
 20 CENTER, LIMITED PARTNERSHIP, a Nevada
 21 Limited Partnership d/b/a MEDICAL DISTRICT
 22 SURGERY; MISSION HEALTHCARE
 23 SERVICES, INC., a California Corporation; LAS
 24 VEGAS RADIOLOGY, LLC, a Nevada Limited
 25 Liability Company; MEDICAL STRATEGY
 26 MANAGEMENT, INC., a Nevada Corporation;
 27 LUKE R. WATSON, M.D., INC., a California
 28 Corporation; WILSON-MCSHANE
 CORPORATION, a Minnesota Corporation; ACS
 RECOVERY SERVICES, INC., an Illinois
 Corporation; HEALTH PLAN OF NEVADA,
 INC., a Nevada Corporation; DOES I-V; and ROE
 CORPORATIONS I-V;

Defendants.

WILSON-MCSHANE CORPORATION, a
 Minnesota Corporation,
 Counterplaintiff,

v.

GLEN LERNER INJURY ATTORNEYS, a
 Nevada Corporation,

Counterdefendant.

1 Defendant Wilson-McShane Corporation (“Wilson”) on behalf of the Construction
2 Industry and Laborers Health and Welfare Trust (the “Trust”), answers Plaintiff’s Complaint in
3 Interpleader (“Complaint”) as follows:

4 1. Answering Paragraphs 1 through 51 of the Complaint, Wilson is without sufficient
5 knowledge or information on which to form a belief as to the truth or falsity of the allegations
6 contained therein, and based on such lack of knowledge or information, denies each and every
7 allegation contained therein.

8 2. Answering Paragraph 52 of the Complaint, Wilson admits each and every
9 allegation therein.

10 3. Answering Paragraphs 53 through 56 of the Complaint, Wilson is without
11 sufficient knowledge or information on which to form a belief as to the trust or falsity of the
12 allegations contained therein, and based on such lack of knowledge or information, denies each
13 and every allegation contained therein.

14 4. Answering Paragraph 57 of the Complaint, Wilson is without sufficient knowledge
15 or information on which to form a belief as to the trust or falsity of the allegations contained
16 therein, and based on such lack of knowledge or information, denies each and every allegation
17 contained therein. Wilson, on behalf of the Trust, also affirmatively alleges that to the extent there
18 are insufficient settlement funds from the third-party insurance company, the Trust’s right to
19 reimbursement supersedes and takes first priority over any other amounts owed to any other lien
20 holder, regardless of Plaintiff’s claim for attorney’s fees.

21 5. Answering Paragraphs 58 through 60 of the Complaint, Wilson is without
22 sufficient knowledge or information on which to form a belief as to the trust or falsity of the
23 allegations contained therein, and based on such lack of knowledge or information, denies each
24 and every allegation contained therein. Wilson, on behalf of the Trust, also affirmatively alleges
25
26
27
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1 that it has valid first priority subrogation, lien, repayment, trust and assignment rights to the third
2 party recovery in the amount of \$18,307.45.

3 6. Answering Paragraphs 61 through 63 of the Complaint, Wilson is without
4 sufficient knowledge or information on which to form a belief as to the trust or falsity of the
5 allegations contained therein, and based on such lack of knowledge or information, denies each
6 and every allegation contained therein.
7

8 **AFFIRMATIVE DEFENSES**

9 **FIRST AFFIRMATIVE DEFENSE**

10 Plaintiff has failed to state a claim against Wilson on which relief can be granted.
11

12 **SECOND AFFIRMATIVE DEFENSE**

13 Plaintiff's claim against Wilson is governed and prevented by the Employee Retirement
14 Income Security of 1974 ("ERISA"), as codified in 29 U.S.C. § 1001 *et seq.*

15 **THIRD AFFIRMATIVE DEFENSE**

16 The Trust's first priority subrogation, lien, repayment, trust and assignment rights of
17 amounts recovered from third parties by Plaintiff is governed by the Trust's Plan's Summary Plan
18 Description.

19 **FOURTH AFFIRMATIVE DEFENSE**

20 It has been necessary for Wilson and the Trust to retain counsel to defend this action, and
21 are therefore entitled to an award of reasonable attorney's fees.

22
23 Wilson reserves the right to amend this answer to allege additional affirmative defenses if
24 subsequent investigation warrants.

25 **COUNTERCLAIM**

26 For its Counterclaim against Plaintiff/Counterdefendant Glen Lerner Injury Attorneys
27 ("Plaintiff"), Defendant/Counterclaimant Wilson-McShane Corporation ("Wilson") on behalf of
28 the Construction Industry and Laborers Health and Welfare Trust (the "Trust") alleges as follows:

1 1. This case arises under 29 U.S.C. § 1132(a)(3). The Court has jurisdiction over the
2 Trust's federal law claims pursuant to 29 U.S.C. § 1132(e) (ERISA) and 28 U.S.C. § 2201
3 (declaratory judgment), and as to the Trust's state law claims, pursuant to 28 U.S.C. § 1367
4 (supplemental jurisdiction).

5 2. The Trust is an employee welfare benefit plan, as that term is used in 29 U.S.C. §
6 1002(1).

7 3. The Trust is a nonprofit organization described in 26 U.S.C. § 501(c)(9), namely a
8 voluntary employee beneficiary association or "VEBA."

9 4. The Trust provides health benefits to Trust participants.

10 5. The Trust is not a for-profit insurance company or an insurance company of any
11 kind, but instead is self-funded through the pooled contributions made by employers, and
12 investment returns on those contributions.

13 6. Robert Hamilton was, at all times relevant to this matter, a Trust participant, as
14 that term is used in 29 U.S.C. § 1002(7).

15 7. Dina Hamilton was, at all times relevant to this matter, a beneficiary to the Trust,
16 as Robert Hamilton's dependent, and as that term is used in 29 U.S.C. § 1002(8).

17 8. Plaintiff was the law firm representing Dina Hamilton with respect to the Trust's
18 claims herein.

19 9. Dina Hamilton was injured as a result of a car accident on January 5, 2007.

20 10. At the time of injury, Dina Hamilton was a beneficiary to the Trust.

21 11. The rules under which a beneficiary, like Dina Hamilton, may receive Trust
22 benefits are set forth in the Trust's Summary Plan Description.

23 12. The Trust's rules include many provisions designed to preserve Trust assets for the
24 payment of benefits to its participants and their family members.

25 13. Because the Trust is a VEBA, and not a for-profit insurance company, the Trust
26 (through its Trustees) must take steps, through the adoption of Trust rules and otherwise, to
27 ensure the Trust expends the limited resources it has as prudently and frugally as possible.
28

1 14. One such rule adopted by the Trust is that, if the Trust pays for injuries caused to a
2 Trust participant by a liable third party, the Trust must be repaid out of recoveries from that liable
3 third party.

4 15. The Trust's rules in this regard are designed to be fair and equitable to all
5 participants, whose employer contributions are used to pay claims, and to ensure repayment to the
6 Trust out of any recovery from a third party.

7 16. The Trust's rules state that, to the extent a beneficiary, like Dina Hamilton,
8 recovers from a third party after the Trust has already paid benefits, the beneficiary is required to
9 reimburse the Trust for those benefits within ten (10) days of such recovery ("Repayment
10 Rights").

11 17. The Trust's Repayment Rights extend to a beneficiary's attorney, agent, assignee,
12 trust or any other person or entity holding funds on behalf of a participant.

13 18. The Trust's rules provide that when a beneficiary is injured by a third party, from
14 the moment medical services are rendered for which the Trust pays benefits, the Trust has a first
15 priority lien on any recoveries from a liable third party, no matter how labeled or denominated
16 ("Lien Rights").

17 19. The Trust's Lien Rights extend to a beneficiary's attorney, agent, assignee, trust or
18 any other person or entity holding funds on behalf of a beneficiary.

19 20. The Trust's rules provide that, to the extent a beneficiary recovers from a third
20 party after claims have already been paid by the Trust, the beneficiary holds those funds in
21 constructive trust for the Trust and must pay such amounts over to the Trust within ten (10) days
22 of receipt ("Constructive Trust").

23 21. The Trust's Constructive Trust rights extend to a beneficiary's attorney, agent,
24 assignee, trust or any other person or entity holding funds on behalf of a beneficiary.

25 22. The Trust's rules provide that any recoveries owed by a third party are deemed
26 assigned to the Trust prior to receipt by the beneficiary, or anyone else receiving such funds on
27 her behalf, and such funds, thus assigned, are the sole property of the Trust and subject to
28 immediate turnover to the Trust.

23. The Trust's rules explicitly require first priority and full reimbursement regardless of whether or not the amount recovered is sufficient to make the beneficiary whole and without deduction or offset for attorney's fees and costs.

24. The Trust's rules provide that all its third-party recovery rules, as set forth above, are cumulative and may be asserted singly, together and in any combination.

25. The Trust's rules provide a strict duty of cooperation with the Trust's third-party recovery rules. Failure to comply with such rules renders a participant ineligible for any Trust benefits under the terms of the ERISA-regulated employee welfare benefit plan.

26. The Trust's rules regarding third-party recoveries state that, if any legal action is required for the Trust to enforce any of its rights, the participant and beneficiaries shall be liable to the Trust for all its legal costs, fees and expenses, without regard to whether such legal action results in a judgment or order.

27. Plaintiff has received recoveries from third parties that exceed all of the claims the Trust has paid for benefits on Dina Hamilton's behalf for her accident-related injuries.

28. Despite demands, Plaintiff has failed and refused to repay to the Trust the amount of medical claims it has paid on behalf of Dina Hamilton related to the injuries caused by a third party.

29. To the contrary, Plaintiff sued the Trust in a state interpleader action, forcing the Trust to pay for attorney's fees and costs to defend that lawsuit and petition for removal to this Court.

30. The funds recovered from the third-party are currently being held by Plaintiff.

**CLAIM ONE: ENFORCEMENT OF ERISA PLAN LIEN RULES
AND FORECLOSURE OF LIEN**

(29 U.S.C. § 1132(a)(3))

31. Paragraphs 1 through 30 above are incorporated by reference here as though fully set forth.

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32. Pursuant to the Trust's Summary Plan Description, an ERISA plan document, a lien exists on third-party recoveries in an amount equal to that paid out by the Trust due to Dina Hamilton's injuries.

33. Plaintiff has failed to turn over the third-party recoveries on which the lien exists.

34. Plaintiff should be ordered to turn over the property on which the Trust's lien exists, *i.e.*, the third-party recoveries that equal the amount of health benefits paid by the Trust attributable to the third-party's liability to Dina Hamilton for her injuries, plus attorney's fees and costs incurred by the Trust in this lawsuit.

CLAIM TWO: CONSTRUCTIVE TRUST

(29 U.S.C. § 1132(a)(3))

35. Paragraphs 1 through 34 above are incorporated by reference here as though fully set forth.

36. Pursuant to the Trust's Summary Plan Description, an ERISA plan document, a constructive trust exists on third-party recoveries in an amount equal to that paid out by the Trust due to Dina Hamilton's injuries.

37. Plaintiff has failed to turn over the third-party recoveries, which it holds in trust for the benefit of the Trust.

38. Plaintiff should be ordered to turn over the property it holds in constructive trust for the Trust, *i.e.*, the third-party recoveries that equal the amount of health benefits paid by the Trust attributable to the third-party's liability to Dina Hamilton for her injuries plus attorney's fees and costs incurred by the Trust in this lawsuit.

CLAIM THREE: ENFORCEMENT OF ERISA PLAN REPAYMENT RULES

(29 U.S.C. § 1132(a)(3))

39. Paragraphs 1 through 38 above are incorporated by reference here as though fully set forth.

40. Pursuant to the Trust's Summary Plan Description, an ERISA plan document, beneficiaries and their attorney, agent, assignee, trust or any other person or entity holding funds on behalf of a beneficiary must repay to the Trust third-party recoveries in an amount equal to

1 that paid out by the Trust due to their injuries, which amounts are deemed assigned to the Trust
2 under its rules.

3 41. Plaintiff has failed to turn over the third-party recoveries in direct violation of the
4 Trust's third-party repayment rules.

5 42. Plaintiff should be ordered to turn over the amounts required to be repaid pursuant
6 to the Trust's third-party repayment rules, *i.e.*, the third-party recoveries that equal the amount of
7 health benefits paid by the Trust attributable to the third-party's liability to Dina Hamilton for her
8 injuries plus attorney's fees and costs incurred by the Trust in this lawsuit.

9 **CLAIM FOUR: STATE LAW VIOLATION OF ASSIGNMENT**

10 43. Paragraphs 1 through 42 above are incorporated by reference here as though fully
11 set forth.

12 44. Plaintiff knew of the Trust's assigned rights to the third-party recoveries
13 attributable to Dina Hamilton's injuries.

14 45. Plaintiff has violated the Trust's assignment by failing to turn over the assigned
15 amounts.

16 46. Plaintiff, as Dina Hamilton's attorneys, is personally liable for losses incurred by
17 the Trust, if any, due to its failure to honor the assignment to the Trust.

18 47. Plaintiff should be ordered to pay the Trust the amount due for its assigned third-
19 party recoveries attributable to Dina Hamilton's injuries plus attorney's fees and costs incurred by
20 the Trust in this lawsuit.

21 **CLAIM FIVE: PRELIMINARY INJUNCTION**

22 48. Paragraphs 1 through 47 above are incorporated by reference here as though fully
23 set forth.

24 49. The Trust will suffer irreparable harm if no injunction is issued as its ability to
25 recover the amounts to which it is entitled will be severely limited.

26 50. The Trust is likely to succeed on the merits of its claims for repayment and
27 reimbursement.
28

1 51. The balance of hardships tips in favor of the Trust because issuance of the
2 injunction would merely delay Plaintiff's ability to disburse the funds until the Court has made its
3 determination; however, failure to issue the injunction, and thereby allowing Plaintiff to dissipate
4 or disburse the funds, would severely limit the Trust's ability to recover the amounts to which it is
5 entitled.

6 52. It is clearly in the public interest to protect employee benefit plans, like the Trust,
7 and see that rules intended to provide funding and security for the promised benefits they provide
8 are upheld.

9 **CLAIM SIX: DECLARATORY JUDGMENT**

10 **(28 U.S.C. § 2201)**

11 53. Paragraphs 1 through 52 above are incorporated by reference here as though fully
12 set forth.

13 54. Contrary to the Trust's claims above, Plaintiff seeks in its Complaint for
14 immediate payment of attorney's fees and costs and to date has completely failed to disburse the
15 amounts owed to the Trust.

16 55. Thus, a dispute has arisen and an actual controversy exists between Plaintiff and
17 the Trust with regard to the proper interpretation and application of the Trust's plan.

18 56. A declaration of rights, responsibilities and obligations of the Plaintiff and the
19 Trust is essential to determine the respective rights and obligations of the parties hereto.

20
21 WHEREFORE, the Trust prays for relief as follows:

- 22 1. That Plaintiff's Complaint be dismissed against Wilson and Plaintiff take nothing
- 23 thereby;
- 24 2. Attorney's fees and costs to defend the Complaint and to bring this Counterclaim;
- 25 3. Judgment against Plaintiff for an amount determined at trial;
- 26 4. Prejudgment interest;
- 27 5. Temporary and preliminary injunctive relief preventing the distribution or
- 28 dissipation of the third-party recoveries received by Plaintiff;

6. For a declaratory judgment against Plaintiff as set forth above.
7. For such other relief as the Court deems appropriate.

Dated this 28th day of May, 2013.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Bryce C. Loveland

Adam P. Segal, Esq.

Nevada Bar No. 6120

Bryce C. Loveland, Esq.

Nevada Bar No. 10132

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Attorneys for Defendant Wilson-McShane Corporation

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(702) 382-2101

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Brownstein Hyatt Farber Schreck, LLP and that on this 28th day of May, 2013, I served a true copy of the foregoing **WILSON-MCSHANE CORPORATION'S ANSWER AND COUNTERCLAIM TO PLAINTIFF'S COMPLAINT IN INTERPLEADER** upon:

Justin G. Randall, Esq.
GLEN LERNER INJURY ATTORNEYS
4795 South Durango Drive
Las Vegas, NV 89147
jrandall@glenlerner.com

Attorney for Plaintiffs

☒ **BY CM/ECF System.**

☒ **BY U.S. MAIL**

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Ebony Davis

An Employee of Brownstein Hyatt Farber Schreck, LLP